Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANDREW L. MANNING, *et al.*,

Petitioners,

v.

THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA (formerly Board of Public Instruction of Hillsborough County, Florida), *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eleventh Circuit Court of Appeals reversed the District Court's ruling that Respondent Hillsborough County School Board had not eliminated the vestiges of *de jure* segregation and had not demonstrated good-faith compliance with the Court's orders and the Equal Protection Clause. The Eleventh Circuit's opinion raises several questions appropriate for review by this Court. The questions presented are:

1. Whether the burden of proving that current racial imbalances are related to the prior *de jure* segregated school system or later actions by school district officials shifts to the plaintiffs, even though the defendant school system has failed to prove that these racial imbalances are not within its control.

2. Whether a school board seeking relief from a desegregation decree may satisfy the good-faith requirement absent specific proof, or other objective evidence, that it is unlikely to revert to its former unlawful conduct.

3. Whether, under the clearly erroneous standard, the factual findings of the District Court may be disregarded by the Court of Appeals in favor of findings by the Magistrate Judge when the District Court findings are based on extensive documentary evidence and reasonable inferences drawn from facts in the record.

LIST OF PARTIES

1. All African-American children eligible to attend public schools in Hillsborough County, Florida, and their next friends, Petitioners;
2. Darnel Cannon, Petitioner;
3. Nathaniel Cannon, Petitioner;
4. Norman Thomas Cannon, Petitioner;
5. Tyrone Cannon, Petitioner;
6. Andrew L. Manning, Petitioner;
7. Gail Rene Myers, Petitioner;
8. Randolph Myers, Petitioner;
9. Sanders B. Reed, Petitioner;
10. Sandra Reed, Petitioner;
11. Shayron Reed, Petitioner;
12. School Board of Hillsborough County, Florida, Respondent;
13. Glenn Barrington, Respondent;
14. Carolyn Bricklemyer, Respondent;
15. Carol W. Kurdell, Respondent;
16. Jack R. Lamb, Respondent;
17. Joe E. Newsome, Respondent;
18. Candy Olson, Respondent;
19. Doris Ross Reddick, Respondent.

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In the
SUPREME COURT OF THE UNITED STATES

No. 00-_____

ANDREW L. MANNING,
et al., Petitioners
v.
THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA (formerly BOARD OF PUBLIC INSTRUCTION OF HILLSBOROUGH COUNTY, FLORIDA), *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Andrew L. Manning, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, App. 1a-41a, is reported at 244 F.3d 927. The opinions of the District Court, App. 42a-56a, 57a-187a, are reported at 28 F. Supp. 2d 1353 and 24 F. Supp. 2d 1277, respectively. The reports and recommendations of the Magistrate Judge, App. 188a-272a, 273a-314a, are unreported.

JURISDICTION

The Court of Appeals entered its judgment on March 16, 2001. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution and 28 U.S.C. § 636(b)(1).

The Fourteenth Amendment provides, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall . . . deny any persons within its jurisdiction the equal protection of the laws.

28 U.S.C. § 636(b)(1) provides in pertinent part:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

STATEMENT OF THE CASE

This case involves a decision by the Eleventh Circuit reversing a District Court ruling that the School Board of Hillsborough County, Florida, *et al.* ("Respondents") had failed to eliminate the vestiges of the prior *de jure* segregated school system, had not complied in good faith with its orders and the Equal Protection Clause, and therefore had not achieved unitary status. The Eleventh Circuit rejected factual

findings detailing how Respondents failed to prove that it was not responsible for the current racial imbalances in its school system and how Respondents failed to act in ways consistent with the District Court's orders and the Equal Protection Clause. In doing so, the Eleventh Circuit relied on the factual findings made by the Magistrate Judge, findings expressly rejected by the District Court.

The critical issues for purposes of this Petition involve the circumstances arising from Petitioners' allegations of violations of the District Court's orders of May 11, 1971 and July 2, 1971 and the consent order of October 24, 1991.

The 1991 Consent Order modified, but did not replace either the May 11, 1971 Order or the July 2, 1971 Order. Instead, it maintained all of the obligations of these prior orders, but permitted Respondents to convert its student assignment system from single-grade centers to three-grade middle schools and four-grade high schools. App. 68a. With this conversion, Respondents intended to provide for a school system organized into various feeder sets or "clusters," containing two or more elementary schools, one or more middle schools and a single high school. "Because the school system remained under the Court's supervision, [Respondents] were required to propose their Middle School Plan (also known as the 'Cluster Plan') to the Court." App. 67a. In implementing this new student assignment system, Respondents pledged to "minimize (to the extent practicable) the number of schools which deviate from the system-wide student enrollment [race] ratios." App. 69a.

In 1994, Respondents' implementation of the third year of this new student assignment system exacerbated rather than ameliorated racial imbalances in the school system. At that time, sixteen of Respondents' schools had exceeded the system-wide African-American student race ratios by nearly 20% or more. As a result, Petitioners filed a motion to enforce the District Court's Orders. The District

Court referred the matter to a Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1). After a hearing and extensive briefing, the Magistrate Judge concluded that the School Board's actions violated neither the 1971 nor the 1991 court orders. App. 188a-272a. Following receipt of the Magistrate Judge's report and recommendation as well as objections filed by Petitioners, the District Court determined that the lack of a finding of unitary status "effectively complicate[d] the analysis of the current controversy and demonstrate[d] the need to expand the scope of the inquiry to a full-fledged determination of whether the Hillsborough County school system has in fact achieved unitary status." App. 189a. Following further evidentiary proceedings, the Magistrate Judge concluded in its second report and recommendation that "the public school system of Hillsborough County ha[d] attained unitary status and should be released from Court supervision pursuant to such further Orders as may be appropriate under the circumstances." App. 269a.

Based on its *de novo* review of the Magistrate Judge's report and recommendation, the District Court rejected the critical finding of unitary status, holding that Respondents had failed to eliminate the vestiges of the prior *de jure* segregated school system and had not complied in good faith with the Court's orders and the Equal Protection Clause. App. 186a. Although the Hillsborough County public school system experienced very little increase in the percentage of its black student population during the last quarter century, the District Court concluded that there was substantial racial imbalance in its student enrollment. App. 84a-85a. Sixteen schools had race ratios of African-American schoolchildren far in excess of the 19.4% African-American population system-wide; all but three were elementary schools. *Id.* The Court was not "convinced that a shift in demographics and residential patterns explains the racial imbalances in the Hillsborough County School system." *Id.*

Respondents relied on data "of school-aged children from ages 0-17 to explain enrollment ratios at the elementary schools." App. 98a. As the District Court noted, "the fact that the 0 to 17 age group logically encompasses children too young and too old to attend elementary school, counsel[s] against placing great weight on the use of these statistics." App. 98a. Indeed, on further inspection, the District Court found that "the *total* number of school-aged students in the attendance zones was an overstatement of *actual* attendees at the elementary schools at issue," App. 106a, and that "the percentage of black school children actually attending each school almost always exceeded the 'overstated' percentages . . . ." *Id.* Based on this evidence and evidence presented by Petitioners, the District Court held that Respondents had "failed to prove that the racial imbalances are not traceable, in a proximate way, to the past *de jure* segregation." App. 87a.

The District Court also found that Respondents had not complied in good faith with its orders. The District Court found that Respondents "unilaterally determined that they were not responsible for the racial imbalances; therefore, there was no need to take affirmative steps" to desegregate. App. 105a. In addition, Respondents failed to recognize and adopt common desegregation techniques, even ones included within the District Court's prior orders. App. 134a. This "lack of appreciation cast[] doubt on the competence of the individuals charged with the task of desegregating the schools." *Id.* The District Court concluded that the lack of good-faith compliance with its orders "taint[ed] the analysis of the other facets of the school district's operations," App. 184a-185a, and made it "very difficult in a case such as this to categorize different aspects of the school system and declare individual areas unitary." App. 185a. Therefore, the Court could not make factual findings for partial unitary status on any aspect of the school system.

In a supplemental opinion, following Respondents' motion to alter or amend this judgment, the District Court reiterated the bases for its prior ruling. The District Court again noted "that the racial imbalances in Hillsborough County appear traceable to [Respondents'] prior unconstitutional practices and the continued unconstitutional inaction." App. 53a. The District Court also amplified the basis for its ruling on good faith, finding no basis to conclude that Respondents would not revert to their prior segregated regime. *Id.* The District Court faulted Respondents for failing to submit "documentation of the strategic planning [they] have engaged in to ensure that discrimination does not occur in the future." *Id.* Likewise, the District Court pointed out the failure of Respondents to provide the information necessary to determine the relationship between school site selection and current racial imbalances. *See id.* ("Wouldn't it be great, if, in the future, [Respondents] were able to say: 'Here it is, we looked at the land value, population, growth patterns, budget, racial compositions, etc., *and even more, without having been ordered by the Court to do so*'").

A panel of the Eleventh Circuit reversed the District Court's decision and remanded with instructions to enter judgment declaring Respondents' school system unitary. App. 2a. Rather than rely on the factual findings actually made by the District Court, the Eleventh Circuit concluded that the District Court "seemed to have adopted *in toto* [Respondents'] theory of the case (and the Magistrate Judge's finding)." App. 19a. The Court later noted: "Since the district judge did not observe any of the testimony from the evidentiary hearing, naturally she could not evaluate the credibility of the witnesses." App. 22a.

The Eleventh Circuit then reversed the District Court's ruling on whether the Respondents had met their burden of proof in eliminating the vestiges of the prior *de jure* segregated school system to the extent practicable, holding that the District Court relied on an improper legal

standard. While the existence of racially imbalanced schools required Respondents to "prove that the imbalances are not the result of present or past discrimination on its part," App. 35a (quoting *Lockett v. Bd. of Educ.*, 111 F.3d 839, 843 (11th Cir. 1997) [hereinafter *Lockett II*]), "a school board overcomes this presumption when it shows that some external force, which is not the result of segregation and is beyond the school board's control, substantially caused the racial imbalances." *Id.* Once this standard had been met, the Eleventh Circuit held, "a plaintiff [seeking] to preserve the presumption of *de jure* segregation . . . must show that the demographic shifts are the result of the prior *de jure* segregation or some other discriminatory conduct." App. 36a. Applying this standard, the Eleventh Circuit found that the plaintiffs "merely persuaded the district judge that demographics *alone* did not account for the racial imbalances," a finding "insufficient to deny [the School Board] a declaration of unitary status." App. 36a-37a.

The Eleventh Circuit also reversed the District Court's finding with regard to good faith. Limiting its review to only the issues of "apathy" and the lack of a viable majority-to-minority (MTM) program, the Eleventh Circuit found that neither issue provided a basis for the District Court's decision. According to the Court of Appeals, the District Court's finding of "apathy" amounted to nothing more than an erroneous application of the law. App. 37a. The Court of Appeals rejected the District Court's conclusions with respect to the MTM program on two grounds: (1) even if properly implemented, this program "should have had only marginal relevance in analyzing whether Appellants' 'policies form[ed] a consistent pattern of lawful conduct *directed to eliminating earlier violations*,'" App. 39a (quoting *Lockett II,* 111 F.3d at 843), and (2) discerning a school board's good faith is a "subjective finding," depending "in part on the judge's personal observation of the witnesses." App. 40a. "Where, as here, a district judge does not personally observe the witnesses in

making subjective finding of fact, we view such a finding with skepticism." *Id.*

Having reversed both the District Court's finding on the elimination of vestiges and its finding on good faith, the Eleventh Circuit declared that "federal judicial supervision of the Hillsborough County school system shall cease." App. 40a-41a.

REASONS FOR GRANTING THE WRIT

Petitioners seek this Court's review for three reasons. First, the Eleventh Circuit improperly shifted the burden of proof on the issue of unitary status from the Respondents to the Petitioners, a holding without precedent in this Court or any other Court of Appeals. Second, the Eleventh Circuit narrowed the scope of this Court's good-faith inquiry to require no showing that Petitioners will be free from discrimination in the future. Third and finally, the Court of Appeals disregarded the factual findings of an Article III judge and instead relied on the findings of a Magistrate Judge.

To address the fundamental issues raised herein, this Court should grant certiorari and review the Eleventh Circuit's decision.

I. The Decision of the Court of Appeals Conflicts With This Court's Decisions and Those of Other Circuits and Improperly Shifts the Burden of Proof on the Unitary Status Issue to Plaintiffs

Under existing law, a school board operating under a desegregation decree is not responsible for any racial imbalances that are beyond its control. However, the talismanic invocation of demographic change does not relieve a school board of responsibility to remedy racial imbalances that it has failed to prove are not within its control. Nevertheless, the Eleventh Circuit has now held

that, so long as a "school board shows that demographic shifts are a substantial cause of the racial imbalances," App. 35a, the school board no longer has a burden to explain or address any racial imbalance in its school system and the burden of proof shifts to plaintiffs to establish that vestiges of the *de jure* segregated system still exist. The Eleventh Circuit's ruling represents nothing less than a fundamental re-allocation of the burden of proof in school desegregation cases. It is clearly inconsistent with this Court's precedents and the precedents of other Court of Appeals. As a result, this Court should grant certiorari to review this decision.

It is well settled that, having once violated the constitutional rights of African-American schoolchildren and their parents by maintaining segregated schools, "[t]he duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system." *Freeman v. Pitts*, 503 U.S. 467, 485 (1992). Long ago, this Court recognized that, given this past violation, any existing racial imbalance is presumed to be the product of a school system which has decided to return to its old segregative ways. *See Keyes v. School Dist. No. 1, Denver, Colorado*, 413 U.S. 189, 208 (1973) ("[A] finding of intentionally segregative school board actions . . . creates a presumption that other segregated schooling within the system is not adventitious"); *id.* at 210 ("[B]e it a statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts"). As this Court reaffirmed in *Freeman*, "[t]his inquiry is fundamental, for under the former *de jure* regime racial exclusion was both the means and the end of a policy motivated by disparagement of, or hostility towards, the disfavored race." 503 U.S. at 474.

External factors, such as widespread demographic change, can effectively preclude further desegregation and thereby provide an explanation for any current racial imbalance. Racial balance is not to be achieved for its own sake, but rather "is to be pursued when racial imbalance has been caused by a constitutional violation." *Id.* at 494. A school district is under no duty to remedy racial imbalances caused by demographic factors "once the racial imbalance caused by the *de jure* violation has been remedied." *Id.* (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1971)). Under such circumstances, this Court's command to desegregate "to the extent practicable" has been satisfied.

The role of the District Court, however, is not to presume that any demographic change or even some substantial degree of demographic change accounts for any current racial imbalance, much less all of it. In *Board of Educ. v. Dowell*, 498 U.S. 237 (1991), this Court required the District Court to consider whether the school district had "made a sufficient showing of constitutional compliance." *Id.* at 249. Before finding that this showing has been made, this Court held, the District Court must engage in a factual determination highly dependent on the circumstances of the case and conclude that, to the extent that demographic change accounts for any racial imbalance, this change is "not attributable to the former *de jure* regime or any later actions by school officials." *Freeman*, 503 U.S. at 496. Nothing in either *Dowell*, *Freeman* or this Court's most recent desegregation opinion, *Missouri v. Jenkins*, 515 U.S. 70 (1995), suggests that, to the extent that a school system wishes to argue that an external factor made further desegregation impractical, the burden for proving this does not fall on the school district or is shifted to the plaintiff schoolchildren.

Furthermore, this Court's examination in *Freeman* of whether "any later actions by school officials," 503 U.S. at

496, could have resulted in the racial imbalance is critical in determining whether a school system has satisfied its burden, even in the midst of demographic change. School board decisions, such as where to locate new school buildings, can influence demographic patterns and promote the re-segregation of a school district. As this Court recognized in *Swann*:

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex . . . . The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

402 U.S. at 20-21; *see also Freeman*, 503 U.S. at 513 (Blackmun, J., with whom Stevens, J., and O'Connor, J., join, concurring in the judgment) ("Close examination is necessary because what may seem to be purely private preferences in housing may in fact have been created, in part, by actions of the school district").

An initially successful desegregation plan does not relieve a school board still under court order from demonstrating that its decisions regarding school construction and school closings did not contribute to any current racial imbalances. *See Swann*, 402 U.S. at 21 ("In devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and District Courts to see to it that future school construction and

abandonment are not used and do not serve to perpetuate or re-establish the dual system"); *see also Freeman*, 503 U.S. at 514 (Blackmun, J., concurring in the judgment) ("Because of the various methods for identifying schools by race, even if a school district manages to desegregate student assignments at one point, its failure to remedy the constitutional violation in its entirety may result in resegregation, as neighborhoods respond to the racially identifiable schools"). This Court further defined the burden in *Keyes*:

> [T]he Board's burden is to show that its policies and practices with respect to school site location, school size, school renovations and additions . . . , student-attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, etc., considered together and premised on the Board's so-called 'neighborhood school' concept, either were not taken in effectuation of a policy to create or maintain segregation in the core city schools, or, if unsuccessful in that effort, were not factors in causing the existing condition of segregation in these schools. Considerations of 'fairness' and 'policy' demand no less in light of the Board's intentionally segregative actions.

413 U.S. at 214.

The Eleventh Circuit's "substantial cause" standard does not comply with this Court's precedents. Under this standard, a school district is no longer responsible for any racial imbalance if it can show that external factors are a "substantial cause" of racial imbalance within the school district. App. 35a ("Where a school board shows that demographic shifts are a substantial cause of the racial imbalances, the defendant has overcome the presumption of *de jure* segregation") (citations omitted). A school system is not required to explain, let alone remedy, other "substantial causes," which may be just as significant – or more – or

constitute the predominant basis for the current racial imbalance. *See* App. 35a-36a ("[A] plaintiff does not undermine the strength of a defendant's demographic evidence by merely asserting that demographics *alone* do not explain the racial imbalances. Rather, for a plaintiff to preserve the presumption of *de jure* segregation, the plaintiff must show that that the demographic shifts are the result of prior *de jure* segregation or some other discriminatory conduct") (citations omitted). This approach not only conflicts drastically with the decisions of this Court, but also those of other Courts of Appeals. Indeed, not a single Court of Appeals has applied the burden-shifting test adopted by the Eleventh Circuit.

Not long after *Freeman*, the Tenth Circuit, in *Brown v. Board of Educ*, 978 F.2d 585 (10th Cir. 1992), clearly rejected this approach, reversing a district court for engaging in precisely this type of burden shifting: "Neither *Freeman* nor *Dowell* suggests that the plaintiffs in the remedial phase of school desegregation litigation must make a new showing of discriminatory intent in order to obtain relief from a current condition of segregation. The district court wrongly required the plaintiffs to make such a showing." *Id.* at 589. Rather than adopt a "substantial cause" approach, the Tenth Circuit clarified the "substantial burden" placed on the defendants in these cases. *Id.* at 590 ("In the continuing remedial phase . . . the district court must impose upon defendants the substantial burden of demonstrating the absence of a causal connection between any current condition of segregation and the prior de jure system"). If this burden is not satisfied, "the district court must retain some measure of supervision over the school system." *Id.* (citations omitted).

Under the Tenth Circuit's approach, a school system does not fulfill its burden even with evidence of demographic change, unless the current racial imbalance is "only a product of demographic changes outside the school district's

control." *Id.* at 591. The Tenth Circuit also applied this standard in *Dowell v. Bd. of Educ.*, 8 F.3d 1501 (10th Cir. 1993), requiring factual findings consistent with *Freeman* that the school system did not play a role in, or contribute in any way to, the demographic change. *See id.* at 1511 n.6. The Eleventh Circuit's "substantial cause" standard falls far short of the Tenth Circuit's mark.

The Eighth Circuit has also rejected the Eleventh Circuit's lenient standard. Following the remand after this Court's decision in *Jenkins*, the Eighth Circuit addressed the presumption and expressly rejected the notion that anything short of proof that the racial imbalances resulting from the dual system have been eliminated in their entirety satisfies a school board's burden. *See Jenkins v. Missouri*, 122 F.3d 588, 593 (8th Cir. 1997) ("Only when a school district has attained unitary status does the burden of proving disparities were caused by intentional segregation shift back to the plaintiffs"); *see also id.* at 595 ("'[C]ertainly plaintiffs in a school desegregation case are not required to prove 'cause' in the sense of 'non-attenuation'") (quoting *Keyes*, 413 U.S. at 211 n.17). The Eighth Circuit then upheld the District Court's finding that the School Board had not met its burden for addressing the vestige of student achievement disparities, despite evidence that they were substantially caused by external factors:

> It is evident that the District Court rejected Dr. Armor's opinion that socio-economic factors alone were the cause of the achievement gap in the [Kansas City Missouri School District]. We cannot say that the District Court clearly erred in making this finding. The burden of proof was on the State to prove that it had not caused the gap, and the State's expert could not explain a third of the achievement gap by his socio-economic theory. The State simply failed to carry its burden, and our discussion could end at this point.

Id. at 598. Regardless of the partial contribution of external factors to existing disparities, the Eighth Circuit, like the Tenth Circuit, refused to shift the burden of proof to the plaintiffs and held that the school system had a continuing responsibility to eliminate to the extent practicable those racial imbalances or disparities within its control.[1]

Applying the well-established principles of this Court, the District Court in this case properly found that Respondents failed to meet their burden of proof with regard to current racial imbalances in their school system. While Respondents argued that changing demographics had both caused these racial imbalances and made it impractical to ameliorate them, the District Court found that Respondents had failed to explain numerous decisions that affected school

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[1] Recent rulings in other Circuits similarly offer no support for the Eleventh Circuit's position. The Sixth Circuit has adopted the *Freeman* approach verbatim, noting that a school district is not required to remedy imbalances caused by demographic shifts "once the racial imbalance due to the de jure violation has been remedied." *Reed v. Rhodes*, 179 F.3d 453, 466 (6th Cir. 1999) (quoting *Freeman*, 503 U.S. at 494). Although the Court there affirmed a finding of unitary status, it based its holding on the absence of any evidence to suggest that the school system's evidentiary burden had not been met, and its opinion provides no support for the Eleventh Circuit's approach. *See id.* at 466-67.

Both the Second and the Third Circuits have held that the burden does shift from the school system to the plaintiff schoolchildren when there had never been a finding of a vestige. *See United States v. City of Yonkers*, 181 F.3d 301, 311 (2d Cir.), *vacated and opinion substituted*, 197 F.3d 41 (2d Cir. 1999), *cert. denied*, 529 U.S. 1130 (2000); *Coalition to Save Our Children v. State Board of Educ.*, 90 F.3d 752, 776 (3d Cir. 1996). This legal distinction is not and could not be the basis for the Eleventh Circuit's decision in this case.

enrollment and that demographic change could not be solely responsible for the racial imbalances. On the first point, Respondents' own analysis failed "to address [their] initial decisions to draw attendance zones, decisions not to act when it was apparent that those zones were inappropriate, or other School Board decisions, such as, location of new schools, or implementation (or lack thereof) of desegregation tools." App. 97a; *cf. Freeman*, 503 U.S. at 515 (Blackmun, J., concurring in the judgment) ("Nor did the court consider how the placement of schools, the attendance zone boundaries or the use of mobile classrooms might have affected residential movement. The court, in my view, failed to consider the many ways [the school board] may have contributed to the demographic shifts").

On the second point, the District Court found Respondents' evidence of demographic change insufficient to prove that they were not responsible for the racial imbalances existing in its schools. *See* App. 86a ("The Court is not convinced that a shift in demographic and residential patterns explains the racial imbalance in the Hillsborough County School System"). Indeed, the demographic evidence presented by Respondents raised more questions than it answered:

> Since the *total* number of school-aged students in the attendance zones was an overstatement of *actual* attendees at the elementary schools at issue, and because the percentage of black school children actually attending each school almost always exceeded the "overstated" percentages, the Court is hesitant to accept [the School Board's] argument that a shift in demography is the sole cause [of] the imbalance in these elementary schools. Moreover, Plaintiffs have provided evidence that the discrepancies were not caused solely by a shift in demography.

App. 106a.

The District Court did not and could not have accepted any demographic data as a basis for releasing the School Board from federal court supervision. If, as was the case here, the demographic evidence did not provide a clear and adequate basis for a factual finding that the School Board did not contribute to or cause the current racial imbalances, then the District Court could not have found that the School Board had met its burden. *See Freeman*, 503 U.S. at 515 (Blackmun, J., concurring in the judgment) ("[T]his Court's decisions *require* the District Court 'to dwell on what might have been.' In particular, they require the court to examine the past to determine whether the current racial imbalance in the schools is attributable in part to the former *de jure* segregated regime or any later actions by school officials"); *cf. Jenkins*, 515 U.S. at 100-01 ("Although the Court of Appeals later recognized that a determination of partial unitary status requires 'careful factfinding and detailed articulation of findings,' it declined to remand to the District Court"). Moreover, following this Court's guidance from *Freeman*, the District Court in this case found that Respondents' history of poor compliance with its orders counseled against a finding that the board had met its burden. *See* App. 86a.[2]

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[2] Once the District Court concluded that Respondents had failed to satisfy their burden with respect to the area of student assignment, given the interrelationships between this area and the other *Green* factors, the District Court appropriately refused to declare the school district unitary in any area. App. 184a-185a; *see Freeman,* 503 U.S. at 497 ("[T]he *Green* factors may be related or interdependent. Two or more *Green* factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well . . . . As a consequence, a continuing violation in one area may need to be addressed by remedies in another").

In reversing the District Court's decision, the Eleventh Circuit misapplied this Court's precedents. Despite ample evidence in the record in support of the District Court's factual findings, the Eleventh Circuit substituted its novel "substantial cause" standard for the prevailing law. Quite simply, the Eleventh Circuit has created a lesser burden for school systems found previously to have engaged in *de jure* segregation, thereby undermining the constitutional guarantee of equal protection. This lesser burden turns this Court's command to desegregate "to the extent practicable" on its head. By shifting the burden away from the defendant school system, the Eleventh Circuit's approach forces plaintiffs in a school desegregation case, not the school system, the party with control of all of the information explaining the bases for its decisions, to account for racial imbalances in the school system. To address the Eleventh Circuit's fundamental error in the interpretation of this Court's precedents as well as its conflicts with other Courts of Appeals, certiorari should be granted.

II. The Court of Appeals' Interpretation of the Good-Faith Standard Conflicts With the Framework Established by this Court's Decisions in *Freeman* and *Dowell* and with the Tenth Circuit's Interpretation

This Court should also decide whether, and to what extent, a school board seeking relief from a desegregation decree must submit proof of how it plans to comply in the future with the dictates of the Equal Protection Clause. By failing to require such proof, and reversing the findings of the District Court despite evidence that the school board might return to its unconstitutional ways, the Eleventh Circuit disregarded an important element of the framework established by this Court in *Dowell* and *Freeman*. In doing so, moreover, it created an irreconcilable conflict with the Tenth Circuit, which has interpreted *Dowell* and *Freeman* to

require proof of "specific policies, decisions, and courses of action that extend into the future" before a district court may grant relief from a desegregation decree. *Dowell*, 8 F.3d at 1513 (internal quotation marks omitted). For these reasons as well, this Court should grant certiorari.

In *Dowell,* this Court established that a school district seeking relief from a desegregation decree must prove both that "the vestiges of past discrimination [have] been eliminated to the extent practicable," *Dowell*, 498 U.S. at 249-50, and that the school district has demonstrated good faith in complying with its obligations under the Equal Protection Clause and the desegregation decree, *see id.*; *see also Freeman*, 503 U.S. at 491-92. With respect to the latter burden, the Court explained that the good-faith requirement embodies *both* retrospective and prospective elements. First, the school district must demonstrate that it has "operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment" and the court's desegregation decrees. *Id.* at 247. Second, and equally important, a school district once found to have engaged in intentional discrimination must submit objective proof that "it was unlikely . . . [to] return to its former ways." *Id.* As the *Dowell* Court reasoned, "A district court need not accept at face value the profession of a school board which has intentionally discriminated that it will cease to do so in the future." *Id.* at 249.

In *Freeman*, this Court reaffirmed that the good-faith requirement embodies a forward-looking component. In that case, the Court held that a school district seeking termination or modification of a desegregation decree must first demonstrate "its commitment to a *course of action* that gives full respect to the equal protection guarantees of the Constitution." 503 U.S. at 490 (emphasis added). Proof of such commitment, the Court explained, demonstrates that a school district "will not suffer intentional discrimination in the future," and provides "parents, students, and the public"

with "assurance against further injuries or stigma." *Id.* at 498; *see also id.* at 498-99 ("'A finding of good faith . . . reduces the possibility that a school system's compliance with court orders is but a temporary constitutional ritual'") (quoting *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987)). Without such proof, the Court made plain, a school district should not be relieved from a desegregation decree: "When a school district has not demonstrated good faith under a *comprehensive plan* to remedy ongoing violations, we have *without hesitation* approved comprehensive and continued District Court supervision." *Id.* at 499 (citing cases) (emphasis added).

The Eleventh Circuit ignored these pronouncements, and looked only to the past in applying the good-faith requirement in this case. *See* App. 38a (holding that Respondents satisfy the good-faith requirement because they "never violated a court order, never were sanctioned, and consulted extensively with the African-American community . . . prior to implementing new student assignments under the 1991 Task Force Report"). By contrast, the Tenth Circuit has properly interpreted *Dowell* and *Freeman* to require proof of *both* past conduct *and* future plans for a school district to satisfy the good-faith requirement. *See Dowell*, 8 F.3d at 1511-13. As that Court explained the "second," forward-looking "prong" of the inquiry:

> The second prong of the good faith inquiry is whether it is "unlikely that the school board would return to its former ways." *Dowell*, 498 U.S. at 247. In *Freeman*, the Supreme Court explained that "[a] school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations." 503 U.S. at 491. We have since interpreted the good faith showing set out in *Freeman* to mean that "[m]ere protestations of an intention to comply with the

> Constitution in the future will not suffice. Instead, *specific policies, decisions, and courses of action that extend into the future must be examined to assess the school system's good faith.*"

Id. at 1512 (emphasis added) (quoting *Brown*, 978 F.2d at 592). Thus, unlike school districts in the Eleventh Circuit, school districts in the Tenth Circuit are required, consistent with *Dowell* and *Freeman,* to submit proof of "future-oriented board policies manifesting a continued commitment to desegregation" before obtaining relief from a desegregation decree. *Id.* at 1513.

The approaches of the Tenth and Eleventh Circuits are irreconcilable. However, a review of other court of appeals decisions following *Dowell* and *Freeman* reveals that confusion over the interpretation of this Court's holdings runs deeper than conflict between the Tenth and Eleventh Circuits. In *Coalition to Save Our Children v. State Board of Educ.*, 90 F.3d 752, 760 (3d Cir. 1996), for example, the Third Circuit quoted the test from *Freeman*, but failed to engage in any inquiry whatsoever with respect to good faith. By contrast, in *Belk v. Charlotte-Mecklenburg Board of Educ.*, 233 F.3d 232, 252-53 (4th Cir. 2000), *vacated and reh'g en banc granted,* Nos. 99-2389 et al. (4th Cir. Jan. 17, 2001), a panel of the Fourth Circuit held that *Freeman* requires consideration of both the past conduct and future plans of a school district. Unlike the Tenth Circuit, however, the panel of the Fourth Circuit suggested that the latter consideration is part of the inquiry into whether a school district has eliminated the vestiges of discrimination to the extent practicable, not the inquiry into good faith. In short, a review of court of appeals decisions reveals a range of interpretations of the test established in *Dowell* and *Freeman.*

Petitioners submit that, among these varied interpretations, the Tenth Circuit's understanding of the good-faith requirement – requiring proof of *both* past compliance with the mandates of the Equal Protection Clause

and "future-oriented board policies manifesting a continued commitment to desegregation" – is the correct interpretation of this Court's precedent and the Constitution. First and foremost, the Tenth Circuit's approach is consistent with the test established by this Court in *Dowell* and *Freeman* while the Eleventh Circuit's approach is not. For example, the Tenth Circuit's approach to the good-faith requirement takes seriously this Court's statement, quoted above, that a district court prior to vacating or terminating a desegregation decree must find "that it [is] unlikely that the school board would return to its former ways." *Dowell*, 498 U.S. at 247. By contrast, the Eleventh Circuit's approach simply ignores this statement and the others in *Dowell* and *Freeman* like it.

Second, requiring a school district to submit future plans gives force to the constitutional guarantee of equal protection while looking solely at a school district's past conduct does not. In particular, mandating such future-oriented proof distinguishes those school districts that have cynically complied with the literal terms of a desegregation decree, without genuine commitment to the principles of the Equal Protection Clause, from those districts that have truly embraced their constitutional obligations and no longer need judicial supervision to ensure continued compliance. By doing so, the requirement "'reduces the possibility that a school system's compliance with [the dictates of the Equal Protection Clause] is but a temporary constitutional ritual.'" *Freeman*, 503 U.S. at 498-99 (quoting *Morgan*, 831 F.2d at 321); *cf. Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (holding that, when a party asserts that relief is no longer appropriate, that party bears the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again" (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). As the Tenth Circuit explained in *Brown*, "Depending on the definition of 'good faith,' the possibility of immediate resegregation following a declaration of unitariness seems all too real. For

this reason, . . . evaluation of the 'good faith' prong of the *Dowell* test *must* include consideration of a school system's continued commitment to integration." 978 F.2d at 592 (emphasis added).

Further, in light of the "complexities arising from the transition to a system of public education freed of racial discrimination," *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955), the Tenth Circuit's understanding of the good-faith requirement is more pragmatic than the understanding adopted by the Eleventh Circuit. As the record in this case reflects, school desegregation decrees are often in effect for significant periods of time before school districts can even plausibly seek relief from them. Moreover, the decrees required to eliminate all vestiges of an unconstitutional *de jure* system are often ambitious in scope. Under these circumstances, those affected by the decrees – parents, students, teachers, administrators, and the public – come to rely upon the policies enacted pursuant to the decrees. Terminating a decree without some indication from the school district regarding how it plans to comply with the Equal Protection Clause absent the decree risks undermining these settled expectations and, particularly in a large school district, risks wreaking havoc on the school system. By contrast, requiring proof of future-oriented board policies manifesting a continued commitment to desegregation more readily assures an orderly "transition to a system of public education freed of racial discrimination," *id.*, and avoids any potential misunderstanding on the part of parents, students, teachers and the like that actions taken by a school district in the wake of judicial supervision are inconsistent with constitutional requirements.

Applying the Tenth Circuit's correct understanding of the good-faith requirement to this case, there is no doubt that the Eleventh Circuit erred in reversing the finding of the District Court that Respondents failed to demonstrate good faith under *Dowell* and *Freeman*, or that the Eleventh

Circuit's error will harm Petitioners. Putting aside self-serving statements of School Board officials – evidence this Court itself has discounted, *see Dowell*, 498 U.S. at 249 – there is simply no evidence in the record to suggest, let alone prove, "that it [is] unlikely that the school board would return to its former ways." *Id.* at 247. Indeed, the District Court – the court best situated to appraise the school district's compliance, *see Brown*, 349 U.S. at 299 – expressly found, after an exhaustive review of the record, that Respondents "fail[ed] to . . . demonstrate that they have strategically planned for the future." App. 50a. In particular, Respondents failed to submit "documentation of the strategic planning [they] have engaged in to ensure that discrimination does not occur in the future." *Id.* Respondents simply did not give the District Court any indication of what they would do if or when unitary status was granted. In fact, the Respondent School Board members did not even vote on whether to seek unitary status in the first place. (10/25/96 Unitary Status Hearing Tr. at 25-26).

Given the absence of affirmative proof that Respondents were unlikely to revert to their former ways, the District Court's finding that Respondents failed to establish good faith was not error – let alone *clear* error – and, but for its misapplication of the test established in *Dowell* and *Freeman*, the Eleventh Circuit would have been required to affirm. For this reason, and because the Eleventh Circuit's erroneous interpretation of *Dowell* and *Freeman* is in direct conflict with the interpretation of the Tenth Circuit, this Court should grant certiorari.

III. The Court of Appeals Misapplied Governing Law in its Review of the District Court's Factual Findings

It is well settled that a district court's factual findings "'shall not be set aside unless clearly erroneous.'" *Anderson*

v. Bessemer, 470 U.S. 564, 573 (1985) (quoting Fed. R. Civ. P. 52(a)). In *Anderson*, this Court cautioned that when a case turns on the resolution of factual disputes, "the task of appellate tribunals . . . [is limited to] determin[ing] whether the trial judge's conclusions are clearly erroneous." *Id.* at 580-81. Nevertheless, the Eleventh Circuit improperly subjected the District Court's decision to more stringent scrutiny solely because the Magistrate Judge – and not the District Court – conducted the evidentiary hearing in this case, and because the Court of Appeals deemed the Magistrate Judge's credibility determinations "dispositive." App. 40a. A court of appeals is not free to apply an elevated standard of review to the findings of a district court on this basis. For this reason, this Court should review the Eleventh Circuit's decision.

Relying on its decision in *Proffitt v. Wainwright*, 685 F.2d 1227, 1237 (11th Cir. 1982), the Eleventh Circuit wrote that "[i]n other contexts . . . [it] ha[d] cautioned district judges from overruling a magistrate judge's finding where credibility determinations are dispositive." App. 40a. It proceeded to reverse the District Court's decision based upon either its improperly constrained view of the District Court's authority to review the magistrate's findings, App. 40a ("Where . . . a district judge does not personally observe the witnesses in making a subjective finding of fact, we view such a holding with skepticism, especially where, as here, the finding is contrary to the one recommended by the judicial official who observed the witnesses"), or its erroneous application of the prevailing law. App. 20a-21a (("[W]e are convinced that the district judge agreed with the magistrate judge and found that shifting demographics was a substantial cause of the racial imbalances in [Respondents'] student assignments and that [Respondents] did not deliberately cause the racial imbalances"). To reach this conclusion, the Eleventh Circuit relied on two fundamentally flawed premises.

First, the Eleventh Circuit wrongly decided that the District Court's factual findings involved credibility determinations. In fact, they did not. The District Court's factual finding that Respondents failed to present sufficient demographic evidence in order to meet its burden for explaining current racial imbalances in the school system did not turn on the credibility of a witness, but rather on the limitations of the demographic evidence Respondents presented. *See* App. 98a ("[T]he fact that the 0 to 17 age group logically encompasses children too young and too old to attend elementary school, counsel[s] against placing great weight on the use of these statistics"). The District Court's factual finding that the School Board failed to comply in good faith with its orders and the Equal Protection Clause based, in part, on the failure of a School Board official to understand a critical part of the 1971 Order did not turn on the credibility of a witness; indeed, the District Court accepted the School Board officials' statements as true. *See* App. 134a ("It is very disturbing that Defendants' 'in-house' desegregation expert testified that he did not completely understand the import of the MTM program . . . . Certainly, [Respondents] lack of appreciation casts doubt on the competence of the individuals charged with the task of desegregating the schools").

Second, the Eleventh Circuit erroneously held that the type of fact-finding conducted by the District Court is entitled to less deference. As this Court observed in *Anderson*, deference to a District Court's factual findings is warranted under the clearly erroneous standard "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." 470 U.S. at 574. As discussed above, the District Court based its findings both on documentary evidence and inferences from other facts. It was error for the Eleventh Circuit to reverse the District Court's decision "simply because it [wa]s

convinced that it would have decided the case differently." *Id.* at 573.

Certainly, the fact that the Magistrate Judge had engaged in fact-finding does not provide a basis for disregarding the District Court's factual findings. Under 28 U.S.C. § 636, a district court judge must make a *de novo* determination of the magistrate judge's findings. *See United States v. Raddatz*, 447 U.S. 667, 674 (1980) ("It should be clear that on these dispositive motions, the statute calls for a *de novo* determination, not a *de novo* hearing. We find nothing in the legislative history of the statute to support the contention that the judge is required to rehear the contested testimony in order to carry out the statutory command to make the required determination").

A district court's authority to make a de novo determination following a magistrate judge's hearing is essential to protect the rights of the litigants in matters referred by the district court pursuant to 28 U.S.C. § 636(b)(1)(B). As one commentator has observed,

> [c]onstitutional concerns explain the statutory distinction between types of pretrial matters. Motions thought "dispositive" of the action warrant . . . a higher standard of review [by the district court] because "of the possible constitutional objection that only an article III judge may ultimately determine the litigation."

12 CHARLES ALAN WRIGHT, *ET AL.*, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D, § 3068.2, at 334 (2d ed. 1997) (citation omitted). This Court has previously recognized that "Article III, § 1 [of the United States Constitution] serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." *Peretz v. United States*, 501 U.S. 923, 929 n.6 (1991) (internal quotation marks and citations

omitted); *see also Raddatz*, 447 U.S. at 686 (Blackmun, J., concurring) (noting that litigants' rights are adequately protected by the statutes governing referral of matters for decisions by magistrate judges because "the district judge – insulated by life tenure and irreducible salary – is waiting in the wings, fully able to correct errors," and therefore there is no "threat to the judicial power or the independence of judicial decisionmaking that underlies Art. III"). While it is true that "litigants may waive their personal right to have an Article III judge preside over a civil trial," *Peretz*, 501 U.S. at 936, that was not the case here. Petitioners did not consent to trial by the Magistrate Judge in this case, and never waived their right to have an Article III judge ultimately pass upon their claim that Respondents had not achieved unitary status. Under these circumstances, the Eleventh Circuit's notion that the Magistrate Judge's findings concerning unitary status should be adopted conflicts with Petitioners' right to final resolution of their dispute by an Article III judge.

The Eleventh Circuit simply had no basis for disregarding the factual findings of the District Court. It does not promote judicial economy to require a District Court to repeat the evidentiary hearing conducted by a Magistrate Judge pursuant to a 28 U.S.C. § 636(b) referral in order for its findings of fact to receive the deference it is due under the "clearly erroneous" standard. This result is inconsistent with the desire for greater judicial efficiency that motivated Congress to enact § 636(b), and contradicts the legislative scheme, which requires de novo review of dispositive issues addressed by the magistrate judge, except when such proceedings are conducted with the consent of the parties. To review and correct this fundamental legal error, certiorari should be granted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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